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In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, ET AL.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FLORIDA, NINE OTHER STATES, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Other Authorities

Benjamin Levinger & Michael A. Zabek, *Credit or Debit: How Do Lower-Income Consumers Pay?*, 22 Communities & Banking 9 (2011) 32

Bill to Ban Surcharges on Credit Card Purchases Approved by Assembly Panel, The Jersey Journal (Feb. 7, 2013) 20

Credit Card Surcharges? No Way, Poll Says, CreditCards.com (Aug. 16, 2012) 20

Credit or Debit Card Interest, Surcharges and Fees 2013 Legislation, Nat'l Conf. of State Legislatures (July 15, 2013) 12

Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, Marketing Letters 12(1) 5 (2001) 19

H.R. Comm. on Commerce, H.B. 448 Staff Analysis (Fla. 1987) 15, 16, 18, 20

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Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009)..... 9

S. Rep. No. 97-25 (1981), *as reprinted in* 1981 U.S.C.A.N.N. 74 ..... 9, 13-14, 15, 17

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INTEREST OF *AMICI*

This case involves a challenge to the constitutionality of a New York law prohibiting sellers from imposing certain credit-card surcharges on their customers. Ten states and the Commonwealth of Puerto Rico have enacted such statutes,[1] and more than 20 other states have considered adopting some such ban in the last three years alone. In addition, the novel theory underlying petitioners' free-speech claim threatens to cast a cloud of doubt on a broad range of valuable state statutes. Accordingly, *amici* states have a substantial interest in the Court's disposition of this case.

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[1] Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; N.Y. Gen. Bus. Law § 518; Okla. Stat. tit. 14a, §§ 2-211, 2-417; P.R. Laws Ann. tit. 10, §§ 11, 12; Tex. Fin. Code Ann. § 339.001.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners challenge the constitutionality of a New York law prohibiting retail businesses from imposing certain credit-card surcharges on their customers. Of particular relevance, petitioners contend that the law impermissibly prevents them from engaging in truthful speech about lawful pricing conduct. In order to resolve petitioners' constitutional claims, this Court must address an antecedent question of statutory interpretation: Does Section 518, properly construed, bar petitioners from doing what they say they want to do? In this Court, as in the proceedings below, petitioners insist that ancillary disputes concerning the meaning of state law be resolved *against* them—that is, they ask this Court to rule that state law does not let them speak as they would like.

That is odd; litigants generally do not go out of their way to undermine the interests they say they seek to vindicate, and nothing prevents petitioners from arguing in the alternative. At any rate, this Court should not be so quick to assume that New York law suppresses petitioners' speech. Indeed, from the perspective of *amici* states, the most important question in this case is not whether the challenged ban on credit-card surcharges will be upheld, but whether the federal courts will continue to exercise appropriate caution in considering constitutional challenges to state statutes. Accordingly, *amici*'s submission to this Court is a modest one, and it should be uncontroversial: State laws restricting credit-card surcharges, like state and federal statutes in general, should be

presumed valid, construed with care, and struck down only as a last resort.

Petitioners' approach here does not come close to complying with those important and well-established principles of constitutional adjudication. Petitioners ask this Court to hold that New York's law has the purpose and effect of regulating speech; but the text of that law says nothing about speech, and traditional tools of statutory interpretation do not support—much less compel—the conclusion that the state's narrow regulation of pricing conduct limits a seller's freedom to disseminate ideas. Petitioners assert that New York's law does not serve *any* legitimate governmental interests; but countless state and federal lawmakers have concluded otherwise—finding that such laws protect consumers from deceptive and unfair pricing practices, enhance market efficiency by facilitating price comparisons, and promote economic dynamism by encouraging the use of credit. Finally, petitioners fault the Court of Appeals for declining to resolve a disputed issue of state law. But a federal court does not "shirk its obligation to fully adjudicate the case," Pet. Br. 45, when it asks if there is any reasonably available alternative to invalidating a duly-enacted state statute. As the Court of Appeals recognized, several viable alternatives are present here.

In the view of *amici* states, this Court should accept respondents' submission that the law they are charged with enforcing is most reasonably construed to allow truthful speech concerning concededly lawful pricing conduct. Respondents' approach, unlike petitioners', gives effect to the commonly understood

distinction between surcharges and discounts, advances the governmental interests supporting anti-surcharge statutes, protects rather than undermines the right to free speech, and does not needlessly cast a cloud of doubt on a broad range of valuable state and federal laws not heretofore subject to heightened constitutional scrutiny.

At a minimum, however, this Court should reject petitioners' view that the federal judiciary must take the initiative to construe state law in such a way as to create rather than avoid constitutional concerns. Consistent with longstanding prudential doctrines informing the exercise of judicial review, abstention or certification can and should be used to clear up any constitutionally meaningful ambiguities in New York's statute before that law is struck down. In other words, it may or may not make sense for petitioners to argue that state law should be read to limit their right to speak; and the state judiciary may or may not accept that argument at the end of the day; in the meantime, however, the federal courts need not and should not be complicit in the gratuitous distortion and invalidation of state law. Such restraint is particularly appropriate where, as here, the statute in question says nothing about speech and is most reasonably interpreted not to invade protected rights.

ARGUMENT

I. CREDIT-CARD SURCHARGES AND CASH DISCOUNTS ARE ECONOMICALLY AND CONSTITUTIONALLY DISTINGUISHABLE.

Petitioners argue that New York's surcharge law must target speech because, insofar as it purports to

regulate pricing conduct, it draws a distinction without an economic difference. In particular, petitioners contend that a credit-card surcharge and a cash discount "are just two ways of framing the same price information." Pet. Br. 1. Because laws like Section 518 do not meaningfully limit what they may *do*, petitioners argue, the purpose and effect of such laws must be to limit what they may *say*.

The premise of that argument is wrong. The critical difference between surcharges and discounts hinges on their opposing relationships to a default value—the regular price. While this default value is set by merchants rather than the state, and merchants theoretically may adjust it in response to anti-surcharge laws, legal and practical considerations limit their ability to do so. Because of these constraints, anti-surcharge laws that allow cash discounts often will have the effect not only of prohibiting surcharges, but also of nudging merchants to keep their regular prices low—a dynamic that petitioners largely overlook in arguing that regular prices are an illusory benchmark.

In short, credit-card surcharges and cash discounts are two different pricing practices; those practices need not lead to the same result; and, even when they do, the alternative ways of getting to that result involve economically significant differences tied to real-world conduct that the states have a right to regulate. A few hypotheticals may help to illustrate those points.

Price ceilings and freezes. Laws imposing price ceilings or prohibiting certain price increases

may make it impossible for a seller to attempt to circumvent a ban on credit-card surcharges by raising prices and then allowing cash discounts. *E.g.*, Fla. Admin. Code R. 15B-9.010 (providing for the setting of maximum rates for vehicle towing and storage); N.Y.C. Admin. Code § 26-501 *et seq.* (rent control law). Suppose, for example, that a preexisting law prohibits certain price increases at the time that a ban on credit-card surcharges is enacted; and suppose also that a particular seller had been charging all customers the same price, regardless of method of payment. If such a seller decided to create a new price differential between credit-card sales and other transactions, he could start giving discounts to cash-paying customers. But he could not increase the regular price he had previously been charging to any customer. Instead, he would have to charge cash-paying customers less than before. Thus, and even assuming all other variables (*e.g.*, the total number of sales, the proportion of sales involving cash-paying customers) could somehow be held constant, a new allowance for cash discounts would not raise the price paid by credit-card customers, and a seller offering such a cash discount would make less profit than would otherwise be the case.

Low-priced items. Alternatively, consider the situation of a single-sticker-price merchant who sells goods for a list price that is lower than the amount of the swipe fee incurred when such goods are purchased by credit card. Say, for example, that the cost of an item is 50 cents, and the swipe fee is one dollar. If a surcharge ban applies, a merchant seeking to pass on the one-dollar swipe fee to credit-card customers could not keep the single-sticker price at 50 cents and raise the price for credit-card-paying customers to

$1.50. Nor could the merchant get to the same result just by giving cash discounts of one dollar from that point on. Without an accompanying one-dollar increase in the tagged price, a store offering one-dollar cash discounts would not only fail to recover the cost of the swipe fee; it would also have to pay customers using cash 50 cents per unit for the privilege of "purchasing" the item in question.

Merchants accepting multiple credit cards, with different swipe fees. Next, consider a merchant who contracts with different credit-card companies imposing different swipe fees. *See* Resp. Br. 37 (noting that "merchant fees . . . vary widely for each credit-card transaction") (citing J.A. 60; U.S. Br. 2). For example, suppose that Bank 1 imposes a swipe fee of 50 cents per transaction, while Bank 2 imposes a swipe fee of 75 cents per transaction. A law barring credit-card surcharges typically would not permit the merchant to sell a product with a single-sticker price of one dollar by charging $1.00 per unit to cash-paying customers, $1.50 to customers using a credit card issued by Bank 1, and $1.75 to customers using a card issued by Bank 2. After all, such a practice would impose penalties on credit-card-paying customers by requiring them to pay amounts over and above the regular price.

The seller could try to get around the law prohibiting credit-card surcharges by increasing list prices and then allowing cash discounts, but doing so would be tricky. Should prices be raised by 50 cents, 75 cents, or some other amount? Similarly, should the corresponding cash discount be 50 cents per unit, 75 cents per unit, or something in between? A merchant

allowed to impose credit-card surcharges could keep things simple—and rake in some additional profit to boot—by imposing on *all* credit-card paying customers the maximum swipe fee it is charged, even if that fee applies only to *some* card-paying customers. *See* Todd J. Zywicki, *The Economics of Payment Card Interchange Fees and the Limits of Regulation* 38–39 (ICLE Financial Regulatory Program White Paper Series) (June 2, 2010) (reporting that some merchants impose credit-card surcharges higher than the amount of the swipe fee).[2] But a merchant considering whether to adopt a cash-discount scheme might be reluctant to give *all* cash-paying customers a discount greater than the amount of *some* swipe fees, particularly if such largess yields a net loss to the merchant. In other words, a surcharge ban might make a seller less likely to engage in differential pricing than would otherwise be the case; and, even if a seller subject to a surcharge ban chooses to put a discriminatory pricing scheme in place, the surcharge ban might give him greater incentive to err on the side of minimizing the value of the cash discount (and, thus, the amount of the price differential) in order to protect his bottom line.

Default rules matter. As those hypotheticals illustrate, a seller may not compensate for a ban on credit-card surcharges, even if the relevant state law allows cash discounts, without first increasing the regular or default price. The practical implications of that economic fact of life are not limited to the particular scenarios discussed above. In the real world, any

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[2] *Available at* www.mercatus.org/system/files/zywicki_interchange.pdf

number of considerations may prevent or discourage a seller from adopting across-the-board increases in regular or list prices, even when (as is not always the case) it is possible to do so. *See* S. Rep. No. 97-25, at 3 (1981), *as reprinted in* 1981 U.S.C.A.N.N. 74, 76 ("recogniz[ing] that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different").

One such consideration is inertia. As everyday experience teaches, choosing one default rule over another—for example, adopting a policy that requires disinterested parties to opt out instead of requiring interested parties to opt in—can have a significant impact on behavior, even when both default rules permit the same range of outcomes. *See generally* Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009). To the extent that laws like Section 518 allow cash discounts while disallowing credit-card surcharges, such laws may reflect a reasonable legislative determination to gently "nudge" merchants in the direction of price uniformity by subjecting them to a default rule that permits but subtly discourages discriminatory pricing schemes.

Another, and perhaps more powerful, disincentive is the fear of price competition. *See* Resp. Br. 32–33. Every business owner knows that consumers respond to changes in posted prices. Accordingly, single-sticker-price sellers contemplating the creation of a price differential might reasonably fear that some customers will flee if the list price goes up. That fear may be particularly acute if the newly-changed list

price is higher than the regular price advertised by competitors. And, to the extent that increases in posted prices result in reduced clientele, sellers may not be able to get to the same economic result via cash discounts as they do by means of credit-card surcharges.

Finally, and even assuming that cash discounts and credit-card surcharges may sometimes be used to get to the same result, that does not mean that laws prohibiting credit-card surcharges have the practical effect of regulating speech. One may as well say that a town restricts speech if it shuts down one road while keeping another open, and both roads go from point A to point B. A driver is still free to take the open road to his destination, he is still free to criticize the road closure, and he may even choose—though it is hard to see why he would—to use the name of the closed road when talking about the open road. What he may not do is take the road that has been closed. The only difference between that hypothetical and the case at hand is that, in this case, it is far from clear that the two roads in question may be used to get to the same place.

In sum, cash discounts and credit-card surcharges are readily distinguishable pricing practices. The distinction between surcharges and discounts does not evaporate whenever state law allows sellers to create price differentials without imposing "surcharges" within the meaning of a particular state statute. Even when state law allows cash discounting, a seller cannot get around a credit-card surcharge ban just by using different labels. Instead, the seller must engage in conduct—raising the regular price, and

then offering a cash discount—at which many merchants may balk. At any rate, a state legislature could reasonably conclude that laws like Section 518 are likely to have a salutary effect on economic conduct traditionally subject to regulation by the states.

II. STATE STATUTES PROHIBITING CREDIT-CARD SURCHARGES SERVE LEGITIMATE GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF IDEAS.

According to petitioners, laws like Section 518 were enacted solely at the behest of powerful interest groups, cannot reasonably be thought to advance legitimate economic or consumer-protection goals, and have the sole aim of silencing protected speech. *See* Pet. Br. 8–16, 26, 37–41. That dark and one-sided narrative helps to set up petitioners' constitutional claim: If statutes prohibiting credit-card surcharges are nothing more than a sinister plot to suppress speech,[3] courts might be inclined to strike them down even though, as some lower courts have recognized, such laws need not be read to invade protected rights.

The truth about surcharge statutes is much more complex than petitioners allow. Some consumer-protection groups, retail associations, and scholars support such laws; others do not. Some state legislatures, after protracted consideration and vigorous

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[3] *See, e.g.*, Pet. Br. 8 ("Over the years, the credit-card industry has succeeded . . . in silencing merchants' attempts to call consumers' attention to the true costs of credit."); *id.* at 15 ("This time, the industry's lobbying was largely covert. To give the illusion of grassroots support, American Express and Visa went so far as to create and bankroll a fake consumer group . . . .").

legislative debate, have determined that surcharge bans help to effectuate important economic policies; other states, after equally careful consideration, have concluded that such laws do not serve the public interest. Congress enacted a nationwide anti-surcharge law that many states, including New York, treated as a model of regulation in this area. Then, after eight years of study and experience, Congress changed its mind, or at least allowed the federal statute to expire. Finally, many state legislatures apparently assumed that anti-surcharge legislation was inappropriate or unnecessary in light of overlapping laws and private contractual arrangements between banks and retailers; other states—as many as 23 states in the last three years alone—have considered enacting their own bans in order to fill the gap left by the expiration of the former Truth in Lending Act ("TILA") and recent changes to private agreements between banks and retailers.[4]

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[4] Arkansas, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New Jersey, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin all introduced anti-surcharge bills during their 2013 legislative sessions. *See* Credit or Debit Card Interest, Surcharges and Fees 2013 Legislation, Nat'l Conf. of State Legislatures (July 15, 2013), http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-2013-legis.aspx (compiling a summary of 44 surcharge bills introduced in multiple state legislatures during the 2013 legislative session). Two of those states, Mississippi and Utah, passed such laws.

As that summary suggests, reasonable people can and do disagree on whether credit-card surcharges should be banned. This Court need not resolve that robust and ongoing debate concerning a complicated question of public policy. As the expiration of the former TILA makes clear, the industry forces purportedly responsible—according to petitioners—for the enactment of such bans (*see* Pet. Br. 8–16) do not always get their way, and the political process is adequate to the task of accommodating competing points of view on this issue.

In assessing petitioners' constitutional challenge, however, this Court should not lightly assume that New York's elected legislators enacted a law that "doesn't directly advance *any* interest in consumer welfare," Pet. Br. 26 (emphasis added). As explained below, countless state and federal lawmakers have concluded that statutes very much like, and in some cases just like, Section 518 serve legitimate governmental interests wholly unrelated to the suppression of ideas. Three interests in particular warrant consideration.

A. Protecting Consumers from Deceptive and Unfair Pricing Practices

In prohibiting credit-card surcharges, Congress sought, *inter alia*, to make sure that merchants "cannot implement two-tier pricing systems which deceive or mislead the consumer." S. Rep. No. 97-25, at 4, *as reprinted in* 1981 U.S.C.A.N.N. at 77. States enacting similar bans have likewise emphasized that consumer-protection objectives, including the goal of avoiding unfair surprises. The sponsor of Texas's law,

for example, explained that "the statute protects consumers from surprise." Sponsor's Statement of Intent, S.B. 641, 84th Leg., R.S. (Tex. 2015) ("the statute protects consumers from surprise"); *see* Hearings on H.B. 1558 Before the House Comm. on Fin Insts., 69th Leg. R.S. (Tex. Apr. 22, 1985) ("[U]ntil the federal government places a permanent ban on [credit-card surcharges], I believe it is in our best interest to protect the consumer.").

Of particular interest here, state and federal lawmakers have found that substantial consumer-protection benefits flow from bans on credit-card surcharges even when the law in question allows discounts for other methods of payment. For example, Congress initially distinguished between surcharge and discount pricing systems in order to ensure that consumers are not subjected to paying "additional amount[s] above the seller's price." Pub. L. No. 94-222, 90 Stat. 197 (1976). Similarly, California's statute was enacted to "protect consumers from deceptive price increases for goods and services by prohibiting credit card surcharges *and* encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card." Cal. Civ. Code § 1748.1(e) (emphasis added).

Legislatures enacting credit-card surcharge bans have identified a variety of ways in which such laws serve to deter and prevent unfair and deceptive business practices. The following discussion addresses two important examples.

Bait-and-switch schemes. Legislatures enacting credit-card surcharge bans have sought to ensure that "consumers cannot be lured into an establishment on the basis of the 'low rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." S. Rep. No. 97-25, at 4, *as reprinted in* 1981 U.S.C.A.A.N. at 77. As Congress recognized, the federal ban on credit-card surcharges addressed that problem because it tended "to assure that consumers will be seeing at least the highest possible price they will have to pay when they see a tagged or posted price," *id.* Here too, states sought to address the same problem. For example, when Florida adopted its anti-surcharge law, the legislature explained that the bill would "benefit . . . consumer[s]" by ensuring that merchants and lessors did not "increas[e] the sales price" "at the time of payment solely for the user of the credit card." H.R. Comm. on Commerce, H.B. 448 Staff Analysis, at 3 (Fla. 1987) ("Fla. H.B. 448 Staff Analysis"); *cf.* S.B. 470, 27th Leg. (Haw. 2013) ("find[ing] . . . that surcharges also create the potential for abuses by retailers since the assessment of a surcharge or amount of a surcharge is not always clear to consumers").

Windfall profits. State legislatures could also reasonably conclude that, absent laws like Section 518, some merchants will use credit-card surcharges to collect windfall profits from consumers. *See, e.g.*, Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 Loy. Consumer L. Rev. 30, 83 (2012). Most sellers have already incorporated swipe fees into

their regular prices. Absent laws prohibiting credit-card surcharges, those merchants could "begin to charge consumers twice for the [same] fee." *New Credit Card Transaction Fees: List of States Charging 4% Surcharge 'Checkout' Fee*, International Business Times (Jan. 18, 2013).[5] Even worse, merchants seeking to recover such windfall profits could shift the blame for their duplicative or exorbitant surcharging practices to credit-card companies. *See* Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 584 (2005) (observing disproportionate rise in credit-card surcharges in Australia, where surcharges are legal, well above merchants' swipe fees, and suggesting price discrimination against cardholders).

Over a long stretch of time, proponents of surcharge bans have expressed particular interest in protecting especially vulnerable groups of consumers. When Florida's bill was introduced in 1987, lawmakers noted that "49% of senior citizens" and "34% of individuals with incomes below $15,000" were using credit cards. Fla. H.B. 448 Staff Analysis, at 5. More than a quarter-century later, concern for disadvantaged and marginalized populations continues to form part of the rationale for enacting such bans. Before passing its anti-surcharge law in 2013, for example, Utah's legislature heard testimony that the law would protect "families—particularly low-income families

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[5] *Available at* http://www.ibtimes.com/new-credit-card-transaction-fees-list-states-charging-4-surcharge-checkout-fee-1042384

and those with children," as well as citizens "continu[ing] to recover from the economic downturn of 2008," by "keep[ing] this money in their pockets so they can continue to contribute to the economy and won't be hurt by unexpected credit-card and debit-card surcharges." Hearings on S.B. 67 Before the S. Comm. on Bus. & Labor (Utah Feb. 14, 2013) ("Utah S.B. 67 Hearings") (statement in support from Utah Housing Coalition).

B. Enhancing Market Efficiency by Facilitating Price Comparisons

In support of the now-lapsed federal statute, congressional lawmakers expressed the "belie[f] that permitting unlimited cash discounts and prohibiting surcharges allows the competitive free market to operate." *See* S. Rep. No. 97-25, at 4, *as reprinted in* 1981 U.S.C.A.A.N. at 77. Some states have taken the same view. *See, e.g.*, Cal. Civ. Code § 1748.1(e) (providing that ban on surcharges was enacted "to promote the effective operation of the free market"). As they see it, the law should allow price differentials based on different methods of payment, but it should compel merchants seeking to employ variegated pricing to use a uniform method of arriving at such differentials. Such uniformity, it is thought, promotes the efficiency of the market by making it easier for consumers to rapidly compare prices.

Maine's prohibition on credit-card surcharges, for example, was enacted "to ensure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to the consumer and avoid the uninformed

use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices." Me. Rev. Stat. § 8-502. The sponsor of Texas's statute went even further, warning that a legal regime allowing surcharges "would practically eliminate comparative shopping." Hearings on H.B. 1558 Before the House Comm. on Fin. Insts., 69th Leg., R.S. (Tex. April 22, 1985) (statement of sponsoring Rep. Blanton).

C. Promoting Commerce by Encouraging Use of Credit Cards

In enacting bans on credit-card surcharges, state and federal lawmakers have emphasized the substantial economic benefits derived from electronic commerce in general and credit-card usage in particular. Highlighting the advantages to consumers, for example, Florida's legislature observed that "[c]redit cards are used for convenience, safety, documentation of expenses and general record keeping, budgeting, to obtain good credit rating, and for additional protection against defective goods and services." Fla. H.B. 448 Staff Analysis, at 5.

As legislators and scholars have explained, businesses likewise benefit from common use of credit cards. To take just a few examples, credit-card use helps merchants by increasing the number of purchases consumers are willing and able to make, simplifying accounting, reducing the risk of theft and related insurance costs associated with cash transactions, and providing for certainty of payment—certainty that is especially important in facilitating larger transactions, for which the likely alternative

payment method is an uncollectible check. Semeraro, *supra*, at 47, 49; *see also* Rosenfeld, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, at 9 (credit-card surcharges surreptitiously force cardholders to subsidize cash-paying consumers because of merchants' "net value gain from bank card acceptance and the resulting downward pressure it exerts on retail prices").

To the extent that credit-card surcharging suppresses sales, states have a strong interest in prohibiting or minimizing such surcharges. *See* Letter from Att'y Gen. Peter F. Kilmartin to R.I. H. Comm. on Corp., *quoted in* Press Release, AG Kilmartin Urges Passage of Credit Card Surcharge Prohibition Legislation, Department of the Rhode Island Attorney General (Jan. 23, 2014) (supporting credit-card surcharge prohibition as "big advantage in attracting consumers"). Robust sales activity helps states in a variety of ways—not least by generating increased tax revenues. The threat of surcharges depressing sales increases with the value of goods and services. *See* Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, Marketing Letters 12(1) 5, 11 (2001) (for high-value transactions, consumers are willing to pay more using credit card than cash). A customer may be willing to swallow a 3% surcharge added to the cost of a candy bar, but the same customer might think twice before paying an extra 3% of the purchase price of a leather sofa. *See Credit Card Surcharges? No Way, Poll Says*, CreditCards.com (Aug. 16, 2012) (poll showing less

than a quarter of respondents were willing to pay more than a $1 surcharge).[6]

Not surprisingly, lawmakers have found that credit-card surcharging discourages credit-card usage. *See, e.g., Bill to Ban Surcharges on Credit Card Purchases Approved by Assembly Panel*, The Jersey Journal (Feb. 7, 2013) (New Jersey's anti-surcharge bill sponsor Assemblyman Vincent Prieto stating that "[a]dditional fees nowadays can mean a decrease in how much a consumer can spend on their families using their credit card").[7] Cash discounting, by contrast, does not tend to suppress credit-card usage to a comparable extent. *See* Pet. Br. 6–8; Br. of Scholars of Behavioral Econ. 8–11. Accordingly, state and federal lawmakers have concluded that laws prohibiting credit-card surcharges tend to promote economically desirable behavior, even when such laws allow merchants to impose differential pricing by discounting other methods of payment. *Expressions Hair Design* v. *Schneiderman*, 808 F.3d 118, 122–23 (2d Cir. 2015); *see also, e.g.*, S. Rep. 97-23, at 3 (1981), as reprinted in 1981 U.S.C.A.N.N. at 76 ("recogniz[ing] that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different"); Fla. H.B. 448 Staff Analysis, at 3 (noting that "cash discounts provide lower prices to the consumer, immediately and directly," while unannounced credit-

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[6] *Available at* http://www.creditcards.com/credit-card-news/poll-credit-card-users-wont-pay-surcharge-1276.php.

[7] *Available at* http://goo.gl/r7NBvd.

card surcharges pose an immediate detriment to the consumer).

In sum, Congress and numerous state legislatures have found that laws prohibiting credit-card surcharges serve legitimate governmental interests entirely unrelated to the suppression of ideas. Those views find substantial support in economic and scholarly studies, and they have been endorsed by wide-ranging groups—including pro-consumer and pro-business groups alike—over a long period of time. So far as the legislative debate is concerned, of course, that is not the end of the story. Petitioners and their *amici* advance thoughtful arguments in support of their preferred policy; and, as the vigorous and continuing dialogue over credit-card surcharges makes clear, reasonable people can disagree on whether surcharge bans should be enacted. In considering constitutional challenges to such laws, however, this Court should not casually dismiss the policy judgments underlying 10 state laws and a previous congressional enactment. Instead, state statutes prohibiting credit-card surcharges, like state and federal laws more generally, should be presumed valid, construed with care, and struck down only as a last resort. As explained in the following part, petitioners' approach does not come close to complying with those well-established principles of constitutional adjudication.

III. FEDERAL COURTS SHOULD EXERCISE CAUTION WHEN CONSIDERING CONSTITUTIONAL CHALLENGES TO STATE STATUTES.

A. New York's statute is most reasonably interpreted to permit truthful speech concerning concededly lawful pricing conduct.

Before addressing petitioners' First Amendment claim, this Court must resolve a threshold question of statutory interpretation: Does Section 518, reasonably construed, bar petitioners from doing what they say they want to do?

In this Court, as in the proceedings below,[8] petitioners insist that state law be read in such a way as to thwart their right to speak. *See, e.g.*, Pet. Br. 3 ("New York's law keeps consumers in the dark by criminalizing truthful speech"); *id.* at 26, 27–28. Of particular relevance here, petitioners contend that "[i]f you use dual pricing, you may tell your customers only that they are paying *less* to pay without credit (a 'discount'), not that they are paying *more* to pay with credit (a 'surcharge')—even though they *are* paying more." Pet. Br. 1 (emphases in original).

New York's Attorney General, on the other hand, takes the view that state law "controls how sellers set

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[8] *See, e.g.*, Reply Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, at 1 ("Rather than defend the statute as written, the state proposes a new one."); *id.* at 2 (arguing that plaintiffs' speech-restricting interpretation "is the *only* reasonable interpretation" of New York's law) (emphasis in original); Plaintiffs' Answer Brief to the Second Circuit, at 1–2, 17–18, 27.

prices and collect money from their consumers, not what they may or may not say about their prices." Resp. Br. 22. Under that view, "a seller is free to 'tell [its] customers, that a credit-card user ultimately pays 'more' than a cash user," and "could even characterize the credit-card price as containing a 'surcharge' over the cash price, so long as the credit-card price was at or below the regular price quoted to prospective buyers before a payment method was identified." *Id.* at 38–39.

This Court should reject petitioners' interpretation of state law for at least two independent reasons.

First, New York's law is most reasonably read not to criminalize truthful speech about permissible pricing schemes. The plain text of the law states only that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518 (McKinney 2016). That text, by its terms, does not bar *any* speech, much less *truthful* speech concerning concededly lawful conduct.

That should be the end of the analysis. *See Beck Chevrolet Co.* v. *Gen. Motors LLC*, 53 N.E.3d 706, 713 (N.Y. 2016) (noting, in the course of answering a question certified to it by the Second Circuit, that "the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning") (internal quotation marks omitted). At any rate, traditional tools of statutory interpretation do not support—much less compel—the conclusion that Section 518 criminalizes truthful speech. New York's courts have

not authoritatively construed Section 518 to do that; the federal statute on which New York's law was modeled—and which contains the exact same language as the operative provision of New York's law—did not do so either, U.S. Br. 23–32; the legislative history accompanying the enactment of Section 518 does not indicate that the law aims to restrict the dissemination of ideas; and no state interest would be advanced by construing the law to prohibit commercial speech truthfully characterizing concededly lawful conduct. *See Expressions*, 808 F.3d at 123–25 (surveying the legislative history of the federal and New York surcharge bans and noting the dearth of interpretive case law from the New York courts); Resp. Br. 3–13 (summarizing the legislative history of the federal and New York surcharge bans).

Second, and assuming *arguendo* that petitioners' alternative interpretation is fairly debatable, petitioners do not give this Court any good reason to read the law in such a way as to create rather than avoid constitutional concerns. Like federal courts interpreting federal law, New York courts take the view that "a [state] statute should be construed so as to avoid doubts concerning its constitutionality." *Lorie C.* v. *St. Lawrence Cty. Dep't of Soc. Servs.*, 400 N.E.2d 336, 341 (N.Y. 1980); *accord LaValle* v. *Hayden*, 773 N.E.2d 490, 494 (N.Y. 2002) ("[C]ourts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional.") (citation omitted). Respondents' eminently sensible construction of the law they are charged with enforcing does just that.

In the view of *amici* states, those considerations are sufficient to support respondents' submission that New York law, properly construed, does not prevent petitioners from truthfully characterizing lawful pricing conduct. *See* Resp. Br. 38–39. In any event, this Court should not go out of its way to adopt a "statute-killing" interpretation where, as here, it need not do so. *Dana's R.R. Supply* v. *Att'y Gen., Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015) (Carnes, C.J., dissenting).

As the Court of Appeals recognized, the prudential doctrine of abstention is properly invoked to avoid "needless friction with state policies," *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 500 (1941). *See Expressions*, 808 F.3d at 139 ("[W]e cannot hold a duly enacted state law unconstitutional based entirely on speculation that the New York courts might give it an expansive and arguably problematic reading that its text does not require."). Alternatively, "[c]ertification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997).

Both options are present here, and a federal court does not "shirk its obligation to fully adjudicate the case," Pet. Br. 45, when it asks if there is any reasonably available alternative to striking down a duly-enacted state statute. *See Arizonans for Official English*, 520 U.S. at 79 ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks

friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.").

B. Respondents' interpretation of the statute they are charged with enforcing vindicates the speech-related interests petitioners purportedly seek to further.

To the extent that New York law bars credit-card surcharges while allowing for discounts on other methods of payment, petitioners raise a number of questions regarding the words they may use to characterize permissible price differentials. Those questions warrant consideration, but they should not lead this Court to strike down any part of New York's law. As explained below, respondents' interpretation of the statute they are charged with enforcing does not just embody the better view of state law; it has the added benefit of accommodating the speech-related rights petitioners purportedly seek to vindicate.

Consider the following three examples, all taken from petitioners' brief.

1. One of the petitioners, Expressions Hair Design, posted a sign informing customers that it would charge 3% "more" to pay for a haircut with a credit card. The salon took down the sign after learning of New York's law, and it now tells customers that it has two prices—a lower price for cash and a higher one for credit. The salon tries to be as careful as it can to avoid characterizing the price difference as a "surcharge" or an "extra" charge for paying with a credit card. Because of the law, however, Expressions is of

the view that it "cannot communicate its prices how it would like—by calling the difference a 'surcharge.'" Pet. Br. 20.

2. Four petitioners want to use a two-tiered pricing scheme and to call the differential a "surcharge" rather than a "discount" because they believe the word "surcharge" is more effective in discouraging customers from paying by credit card. Pet. Br. 21.

3. A pharmacy is concerned that it will be criminally prosecuted for truthfully telling customers about the higher cost of using a credit card if they accidentally say it in the wrong way. Pet. Br. 21.

Under a proper construction of New York law, it would seem that petitioners may do much, if not all, of what they say they want to do. Most importantly, Section 518 does not bar sellers from conveying truthful information about lawful price differences. Resp. Br. 38–39. Thus, Expressions Hair Design may post a sign saying that credit card customers pay "more" than other customers; its employees—like the pharmacy employees in the third example—may truthfully tell customers that credit-card customers pay more; and petitioners may even characterize a lawful price differential as an "extra charge" or "surcharge." Similarly, the four petitioners in the second example who want to employ a two-tiered pricing scheme may "*call* the differential a 'surcharge' rather than a 'discount'" (emphasis added). What petitioners may not do—the only thing they may not do—is *impose* a "surcharge" within the meaning of Section 518. Thus, for example, petitioners may not post a single

sticker price on products and then charge credit-card-paying customers more than that price.

Petitioners' confusion arises because the term "surcharge," like many words, may have different meanings in different contexts. Insofar as the statutory definition is narrower than the full range of colloquial meanings, some merchants may understandably feel inhibited from using the term "surcharge" in communicating with customers, even if they are not imposing a "surcharge" for purposes of the statutory prohibition. The solution to that problem is not to strike down a law permissibly proscribing certain kinds of credit-card fees; it is to make sure that the law is not used or understood to penalize activity that falls outside the ambit of the statutory prohibition.

Our judicial system gives petitioners the tools to do just that. For example, to the extent that they have a credible fear of prosecution, petitioners may ask for a declaratory judgment clarifying that the speech they seek to engage in is not prohibited by the statute; they may also argue, in the alternative, that the law would be unconstitutional if construed to bar truthful speech concerning concededly lawful pricing conduct.

A cautious approach is particularly appropriate here, because the linguistic problem underlying petitioners' claim is not unique to the realm of credit-card regulation. For example, suppose that a state law permissibly prohibits the selling of "obscene" materials, where the term obscene is defined in a manner consonant with the First Amendment as explicated by this

Court's precedents. A merchant who does not sell obscene materials within the meaning of the statute may nevertheless want to use the word "obscene" to describe certain videos that are lawfully being sold; and the intended use of that word may be entirely accurate, insofar as the word "obscene" may be truthfully employed to describe materials that do not satisfy the legal definition of that term. *See, e.g.*, X Oxford English Dictionary 656 (2nd ed. 2000) (defining "obscene" to mean, *inter alia*, "[o]ffensive to the senses, or to taste or refinement"). Such a merchant may be understandably reluctant to use the word "obscene" in describing merchandise, as such an avowal might well generate public criticism and attract unwanted attention from law-enforcement authorities. So far as the obscenity law is concerned, however, the merchant is free to use language that truthfully describes lawful merchandise. Indeed, a business could even be called "Obscene Videos"—as long as it does not actually sell obscene materials for purposes of the statute. And, even if a store sells prohibited depictions, the seller could be held criminally liable only for engaging in the proscribed commercial conduct, not for the form of words used to describe that conduct.

In sum, respondents' interpretation of the statute they are charged with enforcing would seem to embody the better view, and it assuredly embodies a reasonable view, of state law; and respondents' interpretation, unlike petitioners', has the added virtue of protecting rather than undermining the important speech-related rights petitioners purportedly seek to vindicate. That should be the end of this case. As the Second Circuit recognized, federal courts do not wield the Constitution like a wrecking ball, eager to strike

down state laws that need not and should not be read to invade protected rights. Section 518 is just such a law.

IV. PETITIONERS' CONSTITUTIONAL THEORY COULD IMPERIL A BROAD RANGE OF VALUABLE STATE AND FEDERAL LAWS AND REGULATIONS.

Petitioners and their *amici* argue that New York's law targets speech because it draws a distinction without an economic difference. In particular, they argue that a surcharge and a discount are just two ways of saying the same thing—"like calling a glass half full instead of half empty." Pet. Br. 1. To the extent that the law bans credit-card surcharges while allowing discounts on other methods of payment, petitioners reason, it impermissibly restricts how they may characterize effectively identical pricing practices.

The theory underlying petitioners' First Amendment claim does not just endanger New York's statute; if accepted, that theory could also cast a cloud of doubt on—or at least subject to heretofore unprecedented constitutional scrutiny—a broad array of state and federal laws and regulations that reasonably distinguish between different ways of getting to the same result.

A ruling for petitioners would most directly threaten other anti-surcharge laws. At present, ten states and Puerto Rico prohibit merchants from imposing surcharges on customers who choose to pay with credit cards. *See supra* at 1 n.1. Some of these laws, like New York's, say nothing about discounts for

other payment methods but may reasonably be construed to allow them.[9] Others, like Florida's law, expressly authorize offering such discounts.[10] The statutes also differ as to whether they define the term "surcharge,"[11] and if so, whether they narrowly define the term as an additional amount "imposed at the time of" the transaction,[12] or instead broadly define the term as "any means of increasing the regular price."[13] To the extent that these anti-surcharge laws might be construed as petitioners would have this Court construe New York's law, under petitioners' theory, they also could be subject to First Amendment scrutiny.

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[9] *See, e.g.*, Kan. Stat. Ann. § 16a-2-403; Tex. Fin. Code Ann. § 339.001; *see also Rowell* v. *Pettijohn*, 816 F.3d 73, 80–81 (5th Cir. 2016) (noting that Texas's law, like New York's, does not address discounts, but interpreting Texas's law to allow them).

[10] *See* Fla. Stat. § 501.0117(1); *see also, e.g.*, Cal. Civ. Code § 1748.1(a); Conn. Gen. Stat. § 42-133ff(c); Me. Rev. Stat. Ann. tit. 9-A, § 8-509(1); P.R. Laws Ann. tit. 10, § 12.

[11] *Compare, e.g.*, Fla. Stat. § 501.0117 (fully defining "surcharge"), Colo. Rev. Stat. § 5-2-212(1) (same), *and* Kan. Stat. Ann. § 16a-2-403 (same) *with* N.Y. Gen. Bus. Law § 518 (omitting any definition of surcharge) *and* Tex. Fin. Code Ann. § 339.001 (same); *see also* Cal. Civ. Code § 1748.1(d) (without fully defining "surcharge," specifying that certain types of charges "shall be deemed surcharges").

[12] *See, e.g.*, Fla. Stat. § 501.0117(1); Colo. Rev. Stat. § 5-2-212(1); Kan. Stat. Ann. § 16a-2-403.

[13] *See, e.g.*, Me. Rev. Stat. Ann. tit. 9-A, § 8-509(1); Mass. Gen. Laws ch. 140D, § 1.

In addition, five of the above-mentioned jurisdictions extend the same protection to customers who use debit cards,[14] one of which—Connecticut—protects all customers from the imposition of surcharges, regardless of their payment method.[15] To the extent that such laws should be interpreted as petitioners urge, these debit-card surcharge bans—enacted in part to protect lower-income and otherwise vulnerable consumers[16]—might fare no differently under petitioner's theory than would credit-card surcharge bans.

Anti-surcharge laws aside, petitioners' theory could subject to First Amendment scrutiny an array of other economic regulations, including some that have been enacted for public-safety purposes. Take, for example, laws relating to sales of alcoholic beverages. In states like Alaska, Rhode Island, and Vermont, bartenders may not offer "free" alcoholic drinks, but they may sell discounted drink-and-food

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[14] Conn. Gen. Stat. § 42-133ff(a); Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509(1); Okla. Stat. tit. 14A, §§ 2-211(A), 2-417(A); Tex. Bus. & Com. Code Ann. § 604A.002(a).

[15] Conn. Gen. Stat. § 42-133ff(a).

[16] *See* Benjamin Lævinger & Michael A. Zabek, *Credit or Debit: How Do Lower-Income Consumers Pay?*, 22 Communities & Banking 9, 9–10 (2011), *available at* https://goo.gl/DcezWn (survey by Federal Reserve Bank of Boston showing that debit-card use is more prevalent among lower-income consumers than among higher-income consumers).

combinations and offer free food and entertainment.[17] As the Vermont regulation explicitly provides, compliance with these and similar happy-hour laws may require that receipts for drink-and-meal combinations separately list the alcoholic beverage at full price, even though it makes no difference in the total amount that the customer pays.[18]

Under petitioners' theory, instead of targeting conduct, these laws might be construed to control how merchants characterize transactions in an effort to influence consumer behavior. After all, such laws plainly aim to reduce alcohol consumption, and—one might argue—there is no difference in economic result between a non-discounted meal with a "free" $5.00 drink and a drink-and-meal combination discounted by $5.00.[19] For similar reasons, tobacco laws that ban "multi-pack discounts" but allow sales on individual

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[17] *See* Alaska Stat. § 04.16.015(a)(1), (c); R.I. Gen. Laws § 3-7-26(b)(1), (c); Vt. Admin. Code § 14-1-3(49)(a), (52).

[18] Vt. Admin. Code § 14-1-3(52) ("All receipts must specifically outline the separate alcohol purchase at full price."); *see also* 14B N.C. Admin. Code 15B.0223(e) ("The offer of a meal and alcoholic beverage at a single total price is not a violation of this Rule so long as the total price reflects the actual price of the alcoholic beverages and not a reduced price.").

[19] Other alcohol sales regulations might pose similar concerns under petitioners' approach. *See, e.g.*, Ind. Code § 7.1-5-10-20 (banning happy-hour discounts and the offering of multiple drinks for a single price but not generally applicable pricing schemes that reduce the price for subsequent drink orders); Okla. Stat. tit. 37, § 537(B)(4) (ban on certain drink discounts that does not mention drink-and-meal packages); Utah Code Ann. § 32B-5-305 (same).

packs might also prove problematic. *See, e.g.*, *Nat'l Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013). Here too, tobacco merchants might argue, there is no economic difference between an illegal two-for-one special and a legal 50% discount on two individual packs.[20]

Usury statutes arguably exhibit a similar dynamic. Those laws typically limit the rates of interest that lenders may charge for a given loan. *See, e.g.*, Fla. Stat. §§ 687.03(1) (prohibiting lenders from charging for certain loans "a rate of interest greater than the equivalent of 18 percent per annum simple interest"), 687.071(2), (3) (criminalizing the charging of interest at rates that exceed 25 percent per annum). But lenders often remain free to offset the cost of compliance by raising non-interest related charges, resulting in a total loan cost that may equate to what they would have charged absent an interest-rate cap. *See* Todd J. Zywicki, *Consumer Use and Government Regulation of Title Pledge Lending*, 22 Loy. Consumer L. Rev. 425, 427–28 (2010). To the extent that usury laws allow such "[t]erm re-pricing," *id.* at 428, they can fairly be said to focus on the structure of the loan rather than the total loan cost.

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[20] While a ban on "multi-pack discounts" might narrowly be characterized as a "prohibition on charging lower prices to . . . customers making higher-volume purchases," U.S. Br. 20, certain applications of such laws could still raise First Amendment problems under petitioners' theory. As applied to purchases of multiple packs, such a law allows merchants to structure transactions as sales on individual packs, but not as sales on volume purchases—a difference in the structure of the transaction that need not affect the ultimate economic outcome.

For the same reason that petitioners assail New York's surcharge law—its distinction between differently structured but economically equivalent transactions—some of these longstanding and heretofore-unquestioned regulatory measures might trigger a First Amendment analysis. The better view, however, is that government often has a legitimate interest in distinguishing between various methods of reaching a given outcome, and the difference is more than one of just semantics.

For example, in sentencing convicted defendants, the government may reward those defendants who cooperate with law-enforcement authorities and timely accept responsibility for their offense, *see* U.S.S.G. § 3E1.1, even though it may not penalize defendants for invoking their Fifth Amendment privilege against self-incrimination or their Sixth Amendment right to a jury trial. *See, e.g.*, *United States* v. *Cordell*, 924 F.2d 614, 619 (6th Cir. 1991) (collecting cases, noting that "[a]ll circuits addressing a facial challenge to § 3E1.1 on Fifth and Sixth Amendment grounds have concluded that it does not constitute a violation," and "[l]ike the other circuits," holding that "the denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of sentence"); *United States* v. *Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989) ("We are unprepared to equate the possibility of leniency with impermissible punishment."). This is so even though the bottom-line result is arguably the same—a defendant who refuses to cooperate, pleads not guilty, puts the government to its burden of proof, and insists on having the case tried to a jury may not qualify for such a sentence reduction, and thus could

be said to have been "penalized" for invoking his privilege against self-incrimination or his right to a jury trial. He has not been penalized in a manner that offends the Constitution, however, because his sentencing range has not been raised above the default—*i.e.*, he is not subject to a guidelines sentencing range that is higher than it otherwise would have been in the absence of such a provision. *See United States* v. *Parker*, 903 F.2d 91, 105 (2d Cir. 1990) (collecting cases and holding that "[w]e reject [the] contention that the availability of a sentence reduction to one who clearly admits personal responsibility for the offense is the equivalent of an increase in sentence for one who does not").

As illustrated by the examples set forth above, policies of the kind embodied in anti-surcharge laws—policies that focus on the relationship between a readily ascertainable default and traditionally regulable conduct that may lead to a particular outcome, as opposed to focusing on the outcome alone—are more than mere wordplay. Just as there is a practically and constitutionally meaningful difference between raising a sentence above an identifiable default and withholding a sentence reduction, there is also a substantial difference between charging credit-card users more than the regular price and charging other customers less. That conclusion comports with common sense—as respondents point out, "if a restaurant adds two dollars to your bill after you hand them a credit card, you are unlikely to mistake this unambiguous surcharge for a discount." Resp. Br. 2. It also underlies a diverse array of valuable state and federal laws that have not been, and should not be, subject to heightened First Amendment scrutiny.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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